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SC96188

IN THE SUPREME COURT OF MISSOURI

SUSAN GALL, et al.,
Plaintiffs–Respondents,

v.

RUSSELL E. STEELE, et al.,
Defendant–Appellant.

Appeal from the Thirteenth Judicial Circuit Court, County of Boone
Circuit Court No.: 15B CV02046
The Honorable Gary Oxenhandler, Division 2

Transferred after Opinion from the Western District Court of Appeals (WD79820) by Order of this Court

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SUBSTITUTE REPLY BRIEF OF APPELLANT RUSSELL E. STEELE

JOSHUA D. HAWLEY
Attorney General

D. John Sauer # 58721
Charles W. Adamson # 62262
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102
Phone: 573-751-8870
Facsimile: (573) 751-9456
John.Sauer@ago.mo.gov
Attorneys for Appellant Russell E. Steele

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ARGUMENT

This case raises the question whether this Court's explicit constitutional power of "general superintending control" and "supervisory authority" over all inferior courts in the State includes oversight over the hiring and retention of ancillary court officers who are critical to the functioning of the Judicial Department. The plain, ordinary meaning of those constitutional phrases, and all other relevant authorities, confirm that this Court possesses such oversight, which it validly exercised in Chief Justice Price's 2009 Order directing the consolidation of deputy and division clerks under a single appointing authority in each judicial circuit.

I. Chief Justice Price's 2009 Order was a valid exercise of this Court's constitutionally vested "supervisory authority" and "general superintending control over all courts and tribunals" in the State of Missouri, and the 2009 Order supersedes any statutory authority to the contrary. (Reply in Support of Appellant's Point I)

Article V, § 4.1 of the Missouri Constitution confers on this Court "general superintending control over all courts and tribunals" in the State of Missouri, as well as "supervisory authority over all courts." Mo. Const. art. V, § 4.1. The same section provides that this Court "may make appropriate delegations of this power." *Id.* Chief Justice Price's 2009 Order authorizing

the consolidation of deputy and division clerks under a single appointing authority in each judicial circuit was a valid exercise of this power. LF 0110-0112, Appx. 9-11. Because the Order was a valid exercise of this Court's constitutional authority, expressly vested by Article V, § 4.1, the Order necessarily superseded any prior legislative enactment to the contrary. *See Clark v. Kinsey*, 488 S.W.3d 750, 758 (Mo. App. E.D. 2016). "Where such a rule adopted by this court under the express authority of the constitution is inconsistent with a statute and has not been annulled or amended by later enactment of the legislature, the rule supersedes that statute." *State ex rel. Peabody Coal Co. v. Powell*, 574 S.W.2d 423, 426 (Mo. banc 1978). Respondents' arguments to the contrary have no merit.

A. Respondents ignore the plain, ordinary meaning of the operative phrases in Article V, §§ 4.1 and 15.4.

In their discussion of Article V, Respondents invoke several principles of interpretation, but they overlook the most fundamental principle. Like statutory interpretation, constitutional interpretation commences with the plain, ordinary meaning of the Constitution's words. In interpreting the 1945 Constitution, "this Court has consistently given words used in that organic document their plain, ordinary meaning in preference over professionally-accepted, technical definitions." *State Auditor v. Joint Comm. on Legis. Research*, 956 S.W.2d 228, 232 (Mo. banc 1997) (citing numerous cases); *see*

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also id. ("[U]se of the plain, ordinary meaning of a word used in the constitution 'reflects the common sense of the people.'") (quoting *Akin v. Missouri Gaming Comm'n*, 956 S.W.2d 261, 263 (Mo. banc 1997)). "The plain and ordinary meaning is found in the dictionary." *Id.* Yet Respondents never cite any dictionary or discuss the "plain, ordinary meaning" of the operative phrases in the Constitution—*i.e.*, "general superintending control," "supervisory authority," and "provided by law"—and for good reason. On their plain and ordinary meaning, none of these phrases supports Respondents' artificially straitened view of this Court's constitutional authority over the State's inferior courts.

First, as discussed in Judge Steele's opening brief, App. Br. 32, the plain, ordinary meaning of the phrases "supervisory authority" and "superintending control" includes authority over the terms on which ancillary court officers, such as deputy clerks, and hired and retained. Both adjectives "supervisory" and "superintending" denote the power of hiring and firing subordinate officers. Webster's Third New International Dictionary defines "supervisor" as "a person having authority . . . to hire, transfer, suspend, recall, promote, assign, or discharge another employee or to recommend such action." Webster's Third New International Dictionary 2296 (2002). The same dictionary's definition of "superintend" cross-references the definition of "supervisor," which expressly refers to the authority to hire and fire. *Id.* at

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2294 (defining "superintend" as "to have or exercise the charge and oversight of : oversee with the power of direction : supervise").

Similarly, Black's Law Dictionary defines "supervisor," in the context of federal labor law, to include "any individual having authority to hire, transfer, suspend, lay off, recall, promote, discharge, discipline, and handle grievances of other employees." Black's Law Dictionary 1479 (8th ed. 2004); *see also* App. Br. 32. And Black's Law Dictionary defines "superintending control" as "[t]he general supervisory control that a higher court in a jurisdiction has over the administrative affairs of a lower court within that jurisdiction." *Id.* at 353. All these definitions confirm that authority over the recruitment and retention of critical ancillary court officers is at the core of the "supervisory authority" and "general superintending control" conferred on this Court by section 4.1. Thus, Respondents' argument that Judge Steele relies on "implications" and "emanati[ons]" from section 4.1, Resp. Br. 14, has no merit. Judge Steele's interpretation rests on the plain meaning of the words of the Constitution.

The same is true of the phrase "as provided by law" in section 15.4. Mo. Const. art. V, § 15.4. Respondents would construe this phrase narrowly to mean "as provided by *statute*." Resp. Br. 13, 16. But the plain, ordinary meaning of the word "law" is broader than "statute," because statutory law is but one species of "law." Black's Law Dictionary defines "law" as "[t]he

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aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp. the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them." Black's Law Dictionary, at 900. Similarly, Webster's Third defines "law" as "a rule or mode of conduct or action that is prescribed or formally recognized as binding by a supreme controlling authority or is made obligatory by sanction . . . made, recognized, or enforced by the controlling authority," or (in the aggregate) as "the whole body of such customs, practices, or rules." Webster's Third, at 1279. Under its plain and ordinary meaning, the unqualified word "law" encompasses constitutional law, statutory law, decisional law, regulatory law, and any other source of law. By construing "provided by law" to mean solely "provided by statute," Respondents ignore the plain meaning and impermissibly graft a limitation upon the Constitution that is not present in its text.

Because Respondents ignore the plain and ordinary meaning of the critical phrases in the Constitution, their interpretation fails.

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B. Respondents cite no authority that justifies artificially restricting the plain meaning of "as provided by law" in Article V, § 15.4.

Though Respondents argue vigorously that "provided by law" in section 15.4 means "provided by statute," they provide no convincing reason to depart from that phrase's "plain and ordinary meaning," which "is found in the dictionary." *State Auditor*, 956 S.W.2d at 232; *see also* Black's Law Dictionary, at 900; Webster's Third, at 1279. First, their reliance on *Wann* is particularly inapt, because *Wann* expressly states that the phrase "provided by law" includes constitutional provisions as well as statutes. *Wann v. Reorganized Sch. Dist. No. 6 of St. Francois County*, 293 S.W.2d 408, 411 (Mo. 1956). Referring to the phrase "provided by law" in the Constitution, *Wann* stated that "[t]his latter phrase, when used in constitutions, has been held to mean as prescribed or provided by statute, *but it could also refer to other provisions of the constitution*." *Id.* at 411 (emphasis added) (citation omitted). Respondents simply omit the latter, inconvenient phrase from their quotation of *Wann*. *See* Resp. Br. 16.

Moreover, *Wann* went on to explain that the phrase "as provided by law" referred to a statute in that particular case because "there are no other applicable provisions of the constitution to which this provision could refer." *Wann*, 293 S.W.2d at 411. The same is true in most cases in which the

phrase "provided by law" occurs in the Constitution—there happens to be no other constitutional provision that addresses the same issue, so the "law" in question is statutory or other law, not constitutional law. This observation suffices to explain the various instances cited by Respondents in which a constitutional provision stating "as provided by law" (or similar) actually refers to statutory law—these are cases in which, in fact, there was no other relevant constitutional provision. *See* Resp. Br. 17 (citing *Eberle v. Plato Consol. Sch. Dist. No. C-5 of Texas County*, 313 S.W.2d 1, 4 (Mo. 1958); *State ex inf. Nixon v. Moriarty*, 893 S.W.2d 806, 808 (Mo. 1995); *Gerken v. Sherman*, 276 S.W.3d 844, 847 (Mo. App. W.D. 2009); and *State ex rel. Rolla Sch. Dist. No. 31 v. Northern*, 549 S.W.2d 596, 596-97 (Mo. App. 1977)); *see also* Resp. Br. 18 n.9 (citing several cases from outside Missouri dating from 1855 to 1939). Where, as here, there *is* another provision of the Constitution that addresses the same question, the phrase "as provided by law" is plainly broad enough to reference that constitutional provision as well as any relevant statutory law.

For example, Respondents cite Article V, § 14(b), which states that "[p]rocedures for the adjudication of small claims shall be *as provided by law*." Mo. Const. art. V, § 14(b) (cited in Resp. App'x, at A4). Respondents then cite § 482.310, RSMo, to imply that the phrase "as provided by law" refers *only* to enactments by the legislature. Resp. App'x, at A4. But

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Respondents fail to note that section 482.310 was superseded by subsequent Supreme Court rules promulgated under this Court's authority under Article V, § 5. In *Clark v. Kinsey*, 488 S.W.3d 750 (Mo. App. E.D. 2016), the plaintiffs argued that § 482.310, RSMo, clearly stated that Missouri Rules of Civil Procedure do not apply to small claims cases. But the Court of Appeals held that this Court's promulgation of Rules 140 through 152, after section 482.310 was enacted and last amended, impliedly superseded the prior statute. "Rules 140 through 152 were promulgated pursuant to the authority granted to the Missouri Supreme Court by Article V, Section 5 of the Missouri Constitution." *Clark*, 488 S.W.3d at 758. "Where such a rule adopted by [the Supreme Court] under the express authority of the constitution is inconsistent with a statute and has not been annulled or amended by later enactment of the legislature, the rule supersedes that statute." *Id.* at 758 (quoting *Peabody Coal Co.,* 574 S.W.2d at 426).

Clark, therefore, directly contradicts Respondents' argument that "provided by law" means "provided by statute." In *Clark*, a constitutional provision directed that procedures in small claims courts should be "as provided by law." The legislature enacted a statute that governed procedures in small claims court. Subsequently, acting pursuant to a separate grant of constitutional authority, this Court promulgated rules that impliedly superseded the statute. The Court of Appeals correctly held that the

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subsequent rules governed, because they had been validly promulgated under a separate grant of constitutional power. *Id.*

Respondents seek to distinguish *Clark* by pointing out that Article V, § 5 explicitly states that this Court's rules "shall have the force and effect of law," while Article V, § 4.1 does not say that this Court's rules governing the administrative affairs of lower courts "shall have the force and effect of law." Resp. Br. 12, 14-16. But, as discussed above, the "law" referred to in the phrase "as provided by law" includes *section 4.1. itself*, not just the rules promulgated pursuant to this Court's authority under section 4.1. Thus, Respondent's argument rests on a distinction without a difference. Section 4.1 of Article V categorically vests "general superintending control" and "supervisory authority" over all inferior courts in this Court. Mo. Const. art. V, § 4.1. As discussed above, the plain, ordinary meaning of these terms is to confer on this Court final authority over the hiring and firing of ancillary court officers who engage in tasks critical to the administration of justice. The phrase "shall have the force and effect of law" is not a talisman, and the Constitution does not require "magic words" to vest this Court with its inherent power. The plain, ordinary meaning of section 4.1 suffices.

Similarly, this Court has held that a statute that purported to authorize one circuit judge to exercise jurisdiction in *quo warranto* to oust from office another circuit judge violated the plain terms of Article V, § 4.1.

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State v. Kinder, 89 S.W.3d 454, 458-59 (Mo. banc 2002). In *Kinder*, this Court did not require section 4.1 to state specifically that rules promulgated under its authority "shall have the force and effect of law," before the Court could conclude that section 4.1 invalidated a state statute inconsistent with this Court's supervisory authority. *See id.* Rather, the statute was invalid because it contradicted the authority granted in section 4.1 itself: "Article V provides that no other court is permitted to exercise supervisory or superintending authority over circuit courts unless that power is specifically delegated to it by the Supreme Court." *Id.* at 459. So also here, section 483.245.2, RSMo, is invalid to the extent that it purports to displace the valid exercise of this Court's authority under Article V, § 4.1 of the Constitution.

C. Respondents provide no authority that would justify artificially limiting the plain meaning of "supervisory authority" and "general superintending control."

Respondents argue that the phrases "general superintending control" and "supervisory authority" in section 4.1 refer only to "the power to compel inferior courts to carry out ministerial duties, and does not reach a court's exercise of discretion or exercise of judicial power." Resp. Br. 26-27 (citing *State ex rel. St. Louis Boiler & Equip. Co. v. Gabbert*, 241 S.W.2d 79, 82 (Mo. App. 1951), and *State ex rel. Auto Fin. Co. v. Landwehr*, 71 S.W.2d 144, 145-46 (Mo. App. 1934)). In other words, Respondents contend that this power

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refers only to the issuance of common-law writs to the lower courts to compel the performance of ministerial functions and constrain those courts to their proper jurisdiction. *See* Resp. Br. 26 (contending that "the superintending control of superior courts is the power to issue extraordinary writs and compel the performance of ministerial duties and nothing more").

This argument fails for at least two reasons. First, *Gabbert* never addressed the question whether "supervisory authority" and "general superintending control" include authority over the terms on which ancillary court officers are recruited and retained. Rather, the case considered whether "superintending control" included the circuit court's authority to exercise subject matter jurisdiction over a case outside the authorized statutory and common law writs. *See Gabbert*, 241 S.W.2d at 81-82. Thus, *Gabbert* does not foreclose Judge Steele's interpretation here.

Second, Respondents fail to note that, in *Gabbert* and *Landwehr*, the Court of Appeals explicitly stated that the power of "superintending control" extends *beyond* the issuance of common-law writs to compel performance of ministerial duties and to constrain the lower courts to their proper jurisdiction. "[T]he power of superintending control has to do with the matter of keeping an inferior tribunal within the bounds of its jurisdiction by the issuance of the old extraordinary common-law writs of prohibition, mandamus, certiorari, and the like, yet it must also be conceded that in the

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development of our scheme of jurisprudence the power has been held to include the authority to issue other writs, processes, and *orders essential to the complete exercise of the power*, and *relating to matters quite outside any question of jurisdiction*." *Gabbert*, 241 S.W.2d at 82 (emphasis added) (quoting *Landwehr*, 71 S.W.2d at 145-46). In other words, *Gabbert* and *Landwehr* reject the same narrow interpretation of "superintending control" that Respondents advance here. Under those cases, "superintending control" includes "orders essential to the complete exercise of [judicial] power," including those "relating to matters quite outside any question of jurisdiction," such as who is the proper appointing authority for deputy clerks and division clerks. *Id.* Judge Price's 2009 Order was just such an "order[] essential to the complete exercise of [judicial] power." *Id.*

In addition, Respondents contend that this Court's holding in *State ex rel. Geers v. Lasky*, 449 S.W.2d 598 (Mo. 1970), forecloses Judge Steele's interpretation of the Constitution. Resp. Br. 22, 24-25. This contention lacks merit. *Geers* held that the circuit courts—acting on their own, not pursuant to a delegation of authority from this Court—lacked inherent authority to overrule a statute governing the hiring of deputy clerks. *Geers*, 449 S.W.2d at 599. *Geers* did not purport even to address the scope of this Court's explicit constitutional authority vested by Article V, § 4.1.

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D. Respondents' reliance on the canons of construction is meritless.

Respondents argue that Judge Steele's interpretation of the Constitution violates three canons of construction. Resp. Br. 21-23. These arguments have no merit.

First, this Court does not have recourse to the canons of construction when the plain, ordinary meaning of a provision is unambiguous. "If the words are clear, the Court must apply the plain meaning of the law" and "should not employ canons of construction to achieve a desired result." *State v. Bazell*, 497 S.W.3d 263, 266 (Mo. banc 2016). For the reasons stated above, the plain, ordinary meaning of section 4.1 authorized this Court's 2009 Order—as the text of the Order itself acknowledged. *See* LF 0110, Appx. A9 (stating that the 2009 Order was issued "pursuant to article V, section 4 of the Missouri Constitution"). Respondents fail to come to terms with the plain meaning of section 4.1, and thus they fail to justify recourse to the canons of construction in the first place.

Moreover, even if the canons were applicable, they would not support Respondents' "desired result." *Bazell*, 497 S.W.3d at 266. First, Respondents argue that "specific constitutional provisions supersede more general ones concerning the same subject matter." Resp. Br. 21 (citing *Younger v. Missouri Pub. Entity Risk Mgmt. Fund*, 957 S.W.2d 332, 336 (Mo. App. W.D.

1997)). But this canon only applies when there is conflict between the general and the more specific provision. *See Boyd v. State Bd. of Registration for Healing Arts*, 916 S.W.2d 311, 315 (Mo. App. E.D. 1995). Here, there is no conflict between section 4.1 and section 15.4 of Article V. Section 15.4 states that "personnel to aid in the business of the circuit court shall be selected as provided by law," and section 4.1 provides for this selection "by law" by directing that this Court shall have "supervisory authority" over the selection of such personnel. Mo. Const. art. V, §§ 4.1, 15.4. There is no inconsistency between these two provisions.

Second, Respondents argue that Judge Steele's interpretation would render the phrase "as provided by law" "superfluous and meaningless." Resp. Br. 21. Again, this argument has no merit. Section 15.4 states that court personnel shall be selected "as provided by law," and section 4.1 constitutes one source of law that provides for the selection of court personnel. Section 15.4 states the general criterion for the selection of court personnel, and section 4.1 fulfills that criterion. Moreover, Judge Steele does not dispute that the legislature may enact statutes to govern the selection of court personnel—he contends only that such statutes cannot supersede the exercise of this Court's inherent constitutional authority over the same subject matter. Thus, for the period between 1981 and 2009, section 483.245, RSMo,

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validly "provided by law" for the selection of deputy and division clerks. The phrase "provided by law" in section 15.4 is not superfluous.

Third, Respondents argue that Judge Steele's interpretation yields an "absurd result" by "giv[ing] this Court unlimited power over all matters the constitution directs are to be 'as provided by law.'" Resp. Br. 22. Again, this is plainly incorrect. Judge Steele does not argue that the phrase "as provided by law" provides an open-ended grant of authority to this Court, wherever it appears in the Constitution. Rather, Judge Steele argues that broad phrase "as provided by law" includes, among other sources of law, the specific grant of constitutional authority set forth in section 4.1. In other words, where the Constitution grants authority over matters "as provided by law," that authority necessarily includes authority granted pursuant to a separate, specific constitutional provision on the question. Where there is not a separate grant of authority to this Court over a particular subject matter—as is true in most instances where "as provided by law" appears in the Constitution, *see* Resp. App'x, at A3-A18—there is no open-ended grant of authority to this Court.

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E. The separation of powers supports the interpretation of the Constitution that grants to this Court, not the legislature, control over the internal administrative affairs of the Judicial Department.

Respondents argue repeatedly that the principle of separation of powers guaranteed in Article II, § 1 of the Constitution grants supremacy in this area to the legislature. Resp. Br. 11-12. In fact, the exact opposite is true. The principle of separation of powers strongly supports an interpretation of the Constitution that grants to this Court, not the legislature, the final authority to direct the internal administrative affairs of the Judicial Department.

First, the plain language of Article II, § 1 provides that "[t]he powers of government shall be divided into three distinct departments—the legislative, executive and judicial," and that no branch "shall exercise any power properly belonging to either of the others." Mo. Const. art. II, § 1. The authority over the internal affairs of the Judicial Department is a power "properly belonging to" this Court, as the head of that Department, not to the General Assembly. *Id.* Indeed, the Constitution explicitly confers that power on this Court, for all the reason discussed above. *Id.* art. V, § 4.1.

Respondents rely heavily on *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228 (1997), but that case directly supports

Judge Steele's position. In *State Auditor*, this Court held that the General Assembly violated the separation of powers by purporting to authorize a legislative committee to conduct "management audits" of executive agencies. *Id.* at 232-33. This Court reasoned that the legislative authorization "permits the legislature to interfere with the administrative decisions of co-equal branches of government." *Id.* at 233. "This is the sort of impermissible interference with a co-equal branch's performance of its constitutional duties against which the separation of powers doctrine is designed to guard and precisely the complicated and indirect legislative 'encroachment' against which Madison warned." *Id.* (quoting THE FEDERALIST NO. 51, at 240 (J. Madison) (Hallowell ed. 1852)).

State Auditor held that the legislature's assertion of the authority to conduct "management audits" violated the separation of powers, even though it involved no direct control over the agencies' internal affairs. Here, Respondents would grant the legislature a much more far-reaching power—they posit that the legislature has the final authority to dictate the internal affairs of the Judicial Department to the point of controlling who are hired and fired as critical ancillary officers of the courts. If upheld, this power would grant the legislature much greater authority to engage in "impermissible interference with a co-equal branch's performance of its constitutional duties" than the authority that was invalidated in *State*

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Auditor. *State Auditor*, 956 S.W.2d at 233. It would grant the legislature final authority to dictate and control virtually all internal affairs of the Judicial Department by controlling who serves in critical roles as ancillary court officers. This result would violate the separation of powers for both reasons identified by this Court in *State Auditor*—because it would "permit the legislature to interfere impermissibly with a co-equal department's performance of its constitutional power," and because it would "empower the legislative department to perform a duty reserved expressly to the [judicial] department's authority" under Article V, § 4. *Id.* at 231.

II. Chief Justice Price's 2009 Order Directly Authorized the 2013 and 2014 Consolidation Orders of the Second Judicial Circuit. (Reply in Support of Appellant's Point II)

Respondents contend that Chief Justice Price's 2009 Order did not authorize any further consolidation in the Second Judicial Circuit, because that Circuit had already adopted a voluntary consolidation plan in 2008, and the 2009 Order directed "all circuit courts *that have not previously consolidated*" to consolidate the deputy and division clerks under a single appointing authority. LF0110, Appx. A9 (emphasis added); *see* Resp. Br. 28-29. This argument lacks merit for several reasons.

First, it ignores the remainder of the text of the 2009 Order, which begins by noting with approval that "[f]or several years, the Judiciary has

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facilitated the consolidation of deputy circuit clerks and division clerks under the supervision of one appointing authority in those counties volunteering to do so." LF 0110, Appx. A9. "Because of that experience, pursuant to article V, section 4 of the Missouri Constitution," this Court directed "all circuit courts that have not previously consolidated" to do so. *Id.* Moreover, the 2009 Order explicitly grandfathered prior voluntary consolidation agreements, such as the 2008 Consolidation Agreement: "If a court has submitted a plan to the circuit court budget committee prior to October 1, 2009, and it has been approved, it shall be deemed in compliance with the consolidation requirements under this order." LF 0112, Appx. A11. In other words, the 2009 Order expressly contemplated that all circuit courts should be on the same footing with respect to consolidation.

Second, as noted in Judge Steele's opening brief, Chief Justice Teitelman's June 28, 2013 clarifying order set forth "a procedure to modify" consolidation plans, stating that "it is ordered that the circuit court en banc, after consultation with the circuit clerk and other appointing authority, may submit any proposed revisions to its consolidation plan to the circuit court budget committee for its approval." LF 0113, Appx. A12. This clarifying order confirmed that preexisting consolidation plans were subject to amendment by "the circuit court en banc, after consultation with the circuit

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clerk and other appointing authority," which is exactly what Judge Steele did. *Id.* Respondents do not even address this point.

Third, the 2009 Order authorized the Circuit Court Budget Committee ("CCBC") to review each circuit's consolidation plans "to assure that the plan complies with the above consolidation requirements" set forth in the 2009 Order. LF 0111, Appx. A10. In other words, the CCBC exercised delegated authority from this Court to review compliance with this Court's 2009 Order. The CCBC approved the Second Circuit's 2013 Consolidation Plan on June 19, 2013. LF 0121, Appx. A23. The CCBC's approval of the 2013 Consolidation Plan was itself a valid exercise of the authority delegated to the CCBC in the 2009 Order by this Court, "which may make appropriate delegations of this power." Mo. Const. art. V, § 4.1.

Fourth, the 2008 Consolidation Agreement, by its own terms, authorized the 2013 Consolidation Order. The 2008 Agreement stated that "[a]ny disputes that cannot be resolved by mutual agreement of the parties involved shall be submitted to the Judges of the Second Judicial Circuit Court *en banc* for consideration and resolution upon majority vote." LF 0125, ¶ 7. The same page is signed by Circuit Clerk Decker, indicating her agreement to this provision. *Id.* In other words, even if the 2008 Agreement had governed, Judge Steele was still authorized to submit the dispute about the proper appointing authority to a majority vote of the *en banc* Second

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Judicial Circuit, which he did in 2013. Based on the plain terms of that Agreement, Decker was bound by the outcome of that vote by her own prior voluntary assent to the 2008 Agreement. *See id.* To the extent that she now contends that she possessed statutory rights under § 483.245.2, RSMo, she waived any such rights in 2008 by agreeing to submit disputes to the *en banc* court. *Id.*

III. Respondents Waived Their Claims Based on the Putative Procedural Defects in the 2013 Order by Voluntarily Dismissing Count II of their Petition. (Reply in Support of Appellant's Point III)

Respondents concede that they voluntarily dismissed Count II of their Petition, alleging procedural defects in the 2013 Consolidation Order, but they contend that Count I of their Petition also asserted a procedural attack on the 2013 Order. Resp. Br. 35-36. In particular, they contend that Paragraphs 20-25 of the Petition alleged procedural deficiencies in the 2013 Order. Resp. Br. 35.

Respondents are incorrect. Paragraphs 20-25 of their Petition simply recited that (1) Decker was the elected Circuit Clerk of Adair County, LF 0016, ¶ 20; (2) the prior consolidation agreement had been entered in 2008, and it had provided that Decker was the appointing authority for deputy clerks, *id.* ¶¶ 21-23; (3) Judge Steele "appointed himself the appointing

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authority" on May 2, 2013, *id.* ¶ 24; and (4) Judge Steele's "appointment of himself as the appointing authority . . . defies the Missouri Constitution, Missouri State Statutes, and the Missouri Rules of Civil Procedure" and constitutes a "usurpation" of Decker's powers and duties, *id.* ¶ 25. Paragraphs 20-25 of the Petition contain no specific allegations about the supposedly improper use of "notational voting" to poll the members of the en banc court by phone and/or email, or about any other procedural defect in the 2013 Order. *Id.* The only allegations in the Petition that are remotely similar to the complaints now raised on appeal are those in Paragraphs 38-42, which alleged in general terms that Judge Steele violated the Sunshine Law by conducting closed meetings without public notice. LF 0021-0022. Those Paragraphs were contained within Count II of the Petition, which Respondents voluntarily dismissed.

IV. Respondents' Argument that the 2013 en banc Proceedings Violated a Putative Rule Against "Notational Voting" in Court Business Relies Solely on Cases Addressing the Public Service Commission and Has No Merit. (Reply in Support of Appellant's Point IV)

Respondents contend that, in adopting the 2013 Consolidation Order, Judge Steele violated a supposed prohibition against conducting en banc court business through "notational voting." Resp. Br. 35 (citing *State ex rel.*

Philipp Transit Lines, Inc. v. Pub. Serv. Comm'n, 552 S.W.2d 696, 703 (Mo. banc 1977), and *State ex rel. Churchill Truck Lines, Inc. v. Pub. Serv. Comm'n*, 555 S.W.2d 328, 336 (Mo. App. 1977)). This argument has no merit. Both of the cases cited by Respondents related to the specific statute governing the Public Service Commission ("PSC"); they say nothing about the manner in which en banc circuit courts may conduct business.

First, *Philipp Transit* considered a challenge to the PSC's then-longstanding practice of rendering decisions through "notational voting" rather than voting in formal public meetings. 552 S.W.2d at 697. This Court held that a section of the organic statute of the PSC, § 386.130, RSMo, required the Commission to hold meetings in which to render decisions as a body, largely because the statute had been borrowed from a preexisting New York statute that had been interpreted to require public meetings. *Id.* at 699-703. This Court declined to reach the question whether the Sunshine Law also required the PSC to issue decisions at public meetings, because it rested its decision entirely on § 386.130. *Id.* at 703. In other words, *Philipp Transit* rested entirely on the interpretation of a statute that is specific to the Public Service Commission, and has no application to en banc circuit courts. The case provides no support for Respondents here.

Similarly, *Churchill Truck Lines* considered whether the Public Service Commission had violated § 386.130 and the Sunshine Law by engaging in

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decisionmaking through notational voting. 555 S.W.2d at 335-37. The Court of Appeals held that the record on appeal did not contain sufficient information to decide whether the PSC had violated § 386.130 as interpreted in *Philipp Transit*, and the court would not "go outside the record to convict the Commission of error." 555 S.W.2d at 336. With respect to the Sunshine Law, the Court of Appeals declined to decide whether the PSC had violated the Sunshine Law by failing to hold open meetings, because the appellants had waived the point by failing to raise it before the Commission. *Id.* Nothing in the case provides any support for Respondents' contention that Judge Steele could not conduct an email poll of all judges of the Second Circuit to implement the 2013 Consolidation Order.

CONCLUSION

For the reasons stated, Defendant-Appellant Judge Russell E. Steele respectfully requests that this Court reverse or vacate the judgment of the trial court and declare that the May 2013 and April 2014 Adar County Consolidation Orders entered by the Second Judicial Circuit were valid under Chief Justice Price's 2009 Order.

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Respectfully submitted,

JOSHUA D. HAWLEY
Attorney General

/s/ D. John Sauer
D. John Sauer #58721
Charles W. Adamson # 62262
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102
Phone: 573-751-8870
Facsimile: (573) 751-9456
John.Sauer@ago.mo.gov

Attorneys for Defendant-Appellant
Russell E. Steele

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned counsel hereby certifies that on June 9, 2017, a copy of this document was served on counsel of record through the Court's electronic notice system.

This brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 5,977, excluding the cover, the signature block, and this certificate.

The electronic copies of this brief were scanned for viruses and found virus-free through the anti-virus program.

/s/ *D. John Sauer*

First Assistant and Solicitor